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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DR. JEROME SACKS and SAN JUAN
COUNTY,

Appellants,

v.

State of Washington DEPARTMENT
OF ECOLOGY,

Respondent.

SHB No. 89-38

REVISED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Procedural history:

A two-day hearing was held on March 21-22, 1990, in Friday Harbor, San Juan County on the Department of Ecology's denial of a conditional use permit. On May 18, 1990 the Shoreline Hearings Board issued Findings of Fact, Conclusions of Law and Order, vacating the denial due to the Department's lack of jurisdiction.

After filings on reconsideration, the Board issued an Order (August 6, 1990), which re-affirmed that the proposal did not require a shoreline conditional use permit, but concluded the proposal was not exempt from the requirement for a shoreline substantial development permit. In the interests of judicial economy and to avoid piecemenal litigation, the Board amended the pre-hearing order to include the issue of whether a substantial development permit should issue, and ordered oral argument on whether a shoreline variance permit was required. The Order deferred deciding the merits of the substantial

REVISED FINAL FINDINGS OF
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1 development permit issue until after oral argument on the variance.

2 Argument was heard on August 28, 1990. Present for the
3 Shorelines Hearing Board were: Board members Harold S. Zimmerman,
4 presiding; Judith A. Bendor, chair; Nancy Burnett, and Michael
5 Gibson. All members, including Gordon Crandall, were present during
6 the hearing on the merits and have reviewed the record.

7 During the hearing, attorney Robert Johns of Reed, McClure,
8 Mocer, Thonn & Moriarity (Seattle) represented appellant Dr. Jerome
9 H. Sacks. Assistant Attorney General Allen T. Miller, Jr. represented
10 the Department of Ecology. (The County was present but did not
11 present a case.)

12 For simplicity, the Shorelines Hearings Board issues this Revised
13 Findings, Conclusions and Order, which supercedes other opinions.
14 After hearing and reading argument, reviewing exhibits and the record,
15 and having deliberated, the Board makes these:

16 FINDINGS OF FACT

17 I

18 Dr. Jerome Sacks owns 8.3 acres of land on what is commonly known
19 as Eagle Point, on the south side of San Juan Island. He is a retired
20 heart surgeon. He purchased the property and intended to build a
21 single family residence, to include a study where he would maintain a
22 library and write medical articles. His original plan was to build
23 the home within 200 feet of the ordinary high water mark (OHWM).
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1 After consulting with his architect and builder he decided to
2 relocate the main residence to the rear of the lot, some 367 feet from
3 the ordinary high water mark.

4 The studio/library, which had originally been a part of the
5 house, is to be located 67 feet from the OHWM. The most recent design

6 The most recent design would make the studio 17 feet high, with a
7 860 sq. ft. footprint set two feet into the site to reduce its
8 visibility. By locating the studio at the lowest point between two
9 natural rock outcroppings, it would largely minimize the visual and
10 physical impact of the structure. Dr. Sacks has also agreed to the
11 recommended conditions to locate and construct the studio to blend
12 into the site as much as possible. Both the base elevation and roof
13 pitch shall be designed to result in the lowest feasible profile.
14 Exterior material and colors shall be subject to the Planning
15 Department's approval to be most appropriate for blending with the
16 site.

17 Most of the property is 60 to 75 feet above sea level. A rugged
18 rocky slope drops nearly vertically into the slope. The top of the
19 rocky slope is approximately 67 feet farther inland than the proposed
20 studio site.

21 II

22 The San Juan County Shoreline Master Program ("SMP") designates
23 all the shorelines within Dr. Sacks' property and shorelines to the
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1 west as Conservancy. The area to the east is designated Suburban by
2 the Master Program and contains an approved 39-lot residential
3 subdivision, including 22 waterfront lots and 19 upland lots. Seven
4 of the waterfront and 8 of the upland lots have homes on them.

5 Dr. Sacks submitted an application for his studio/library to San
6 Juan County. This was then analyzed as a request for a shoreline
7 conditional use permit. The County issued a Mitigated Declaration of
8 Non-Significance with conditions, to reduce the visual impact of the
9 studio and to maintain the site in a natural condition.

10 The San Juan County Planning Department's report stated that as
11 conditioned, the studio complied with policies and criteria of the SMP
12 and the Shoreline Management Act.

13 The Board of County Commissioners held two public hearings on the
14 project, at which no one testified in opposition, and unanimously
15 approved Dr. Sacks' shoreline conditional use permit. Subsequently,
16 the applicant further redesigned the studio to reduce its square
17 footage and lower its roof.

18 III

19 Because the permit was issued as a conditional use permit, it was
20 sent to the Department of Ecology for approval. DOE denied the permit
21 on May 20, 1989 on the basis that it violated the San Juan County
22 Master Program ("SMP"), the Shoreline Management Act, and WAC
23 173-14-140's requirements for conditional use permits. This denial
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1 was appealed to the Shorelines Hearings Board and became our SHB No.
2 89-38.

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4 IV

5 During these proceedings, the question of aesthetics impact was a
6 subject of extensive testimony. We find that the proposed
7 studio/library has a site-sensitive design. As designed and at the
8 proposed location, the studio/library will not have a significant
9 adverse impact on aesthetics. To the contrary, as advocated by the
10 Department, if the building were placed in a location farther away
11 from the shoreline it would likely lead to a more dominant profile and
12 have a negative view impact for nearby residents.

13 V

14 The Department contended that impacts on eagles would be
15 significant and adverse. We do not agree.

16 Although the eagles have become the primary focus of Ecology's
17 case, the history of this case points to lack of interest in the early
18 stages. The Department wrote to the County January 17, 1989, stating
19 . . . "The dwelling appears to be sensitively designed with the
20 shoreline environment in mind which is consistent with the conservancy
21 environment designation."

22 Eagles were not listed as an issue in the pre-hearing order of
23 August 8, 1989.

24 Wildlife Biologist James Watson the Department of Wildlife, and
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1 the State of Washington's number one authority on eagles wrote to the
2 San Juan County Planning Department regarding the Sacks residence and
3 studio: . . . "as you know, there are no known eagles nests on the
4 property and the nearest nest is about one mile north (old Camp #496)
5 . . . If there are any concerns with the project it would be loss of
6 foraging perches due to clearing for building sites. However, the old
7 aerial photo I have indicates few if any large trees on the property.
8 My recommendation would be to maintain as many of these trees as
9 possible by selectively siting the structures. There will be no
10 management plan necessary prior to issuing the permit . . . "

11 Biologist Watson followed this letter with an addendum . . .
12 "Since that time I have gathered further information on eagle use of
13 the project site from people that live near the area."

14 "It appears that adult eagles frequent the rocks along the
15 shoreline of the property throughout the year. This is probably a
16 foraging area of the Old Camp eagles that nest to the north.

17 "With this additional information, the main concern appears to be
18 the location of the studio in relation to the rocky outcrops.
19 However, without specific information on eagle perches, and not having
20 visited the property myself, it is difficult to make specific
21 recommendations on how the impacts of the studio could be minimized. .
22 . I'm sure they are interested in maintaining eagles on their
23 property for their enjoyment."

1 During his testimony at the hearing, Mr. Watson said he had not
2 visited the property or the landowners, but said that location outside
3 the shoreline would have a more adverse impact on eagles because the
4 studio would be higher than the rock used as an eagle perch.

5 The State's leading eagle expert has been impressed with the
6 growth in eagle population on San Juan Island and apparently believes
7 the eagles can continue to thrive at Eagle Point when there is
8 sensitivity to their perches on the rocks. This has been Dr. Sacks'
9 intention throughout this process. The open space he is maintaining
10 on his 8.3 acres, coupled with the water around San Juan Island will
11 continue to provide habitat for even more eagles.

12 VI

13 Any Conclusion of Law deemed a Finding of Fact is hereby adopted
14 as such.

15 From these Finding of Fact, the Board comes to these Conclusions
16 of Law:

17 CONCLUSIONS OF LAW

18 I

19 Several legal issues have to be addressed: Is a conditional use
20 permit required for this proposal? Is a variance permit required? Is
21 a shoreline substantial development permit required, and if so, should
22 one issue?

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2 II

3 The DOE contends that a conditional use permit is required
4 because the studio is an unnamed use which is not classified or set
5 forth in the San Juan County Shoreline Master Program (SMP). WAC
6 173-14-140(2). The County, as well, concluded that a conditional use
7 permit was necessary, and applied stringent conditional use
8 requirements before granting the permit. The Board concludes that a
9 conditional use permit is not required.

10 We conclude that the proposed use is part of the residential use
11 category. The SMP at 16.40.517, in specifying the use regulations for
12 residential development, states:

13 *[...]The policies and regulations in this section*
14 *are designed to deal with all forms of residential*
development.

15 Residential uses are permitted uses in the Conservancy environment.

16 A normal appurtenance to a residence, even though a separate
17 structure, is part and parcel of the residence. We believe a studio
18 is a "normal appurtenance" to a residence as is a garage, a deck or a
19 fence. See WAC 173-14-040(g).

20 We conclude that the studio/library is a permitted residential
21 use and not an "unnamed" or "unlisted" use. Therefore the proposal
22 does not require a conditional use permit.

23 III

24 The permit scheme established by the Shorelines Management Act
25 gives the Department of Ecology approval and disapproval power over
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1 variance permits, as well. RCW 90.58.130. It is the Department's
2 position that a variance permit should have been required. We
3 conclude to the contrary.

4 The San Juan County SMP, General Regulations states:

5 *(4) Every residential structure built at a beach site shall be*
6 *located landward of the berms, bank, or bluff as dictated by the*
7 *topography to assure protection of the beach site. Page 38*

8 It is the County's position that the SMP variance requirements
9 are performance criteria, which require a case-by-case analysis to
10 determine if a variance is necessary. The Department contended during
11 oral argument that the outcropping rock on which eagles roost to the
12 northwest of the proposed structure, constituted the topography behind
13 which the studio must be located.

14 We disagree. There is simply no evidence that the rock is a
15 berm, bank or bluff. It is a single rock. Therefore, a variance
16 permit is not required.

17 IV

18 The proposal does require a shoreline substantial development
19 permit.

20 The controlling rule here is WAC 173-14-040(1)(g) defining
21 exemptions from substantial development. It provides:

22 *Construction on wetlands by an owner, lessee or*
23 *contract purchaser of a single-family residence for his*
24 *own use or for the use of his family, which residence*
25 *does not exceed a height of thirty-five feet above*
26 *average grade level and which meets all requirements of*

1 the state agency or local government having
2 jurisdiction thereof, other than requirements imposed
3 pursuant to this chapter. "Single-family residence"
4 means a detached dwelling designed for and occupied by
5 one family including those structures and developments
6 within a contiguous ownership which are a normal
7 appurtenance. An "appurtenance" is necessarily
8 connected to the use and enjoyment of a single-family
9 residence and is located landward of the perimeter of a
10 marsh, bog, or swamp. On a state-wide basis, normal
11 appurtenances include a garage; deck; driveway;
utilities; fences; and grading which does not exceed
two hundred fifty cubic yards except to construct a
conventional drainfield). Local circumstances may
dictate additional interpretations of normal
appurtenances which shall be set forth and regulated
within the applicable master program. Construction
authorized under this exemption shall be located
landward of the ordinary high water mark; (emphasis
added).

12 A studio is neither exempt under the listing of normal appurtenances
13 in the State rule nor set forth as exempt in the master program.
14 Therefore it is not exempt. While a studio is not included in the
15 list of normal appurtenances, it does not follow that it was "unnamed
16 and/or not contemplated in this [San Juan County] Master Program,"
17 requiring a conditional use permit. SJSMP §16.40.902. "Residential
18 development" means development which is primarily devoted to dwelling
19 units or designed for construction of dwelling units. SJSMP
20 §16.40.1301(88). An "accessory use" means any stuture or use
21 incidental and subordinate to a primary shoreline use or development.
22 SJSMP §16.40.1301(2). Thus, while a studio is not exempt because it
23 is not included in the list of exempt appurtenances, it is adequately
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1 described as a permitted accessory use in the SJSMP. Thus, while no
2 conditional use is required, the proposal does require a substantial
3 development permit.

4 V

5 Because neither a conditional use nor variance shoreline permit
6 is required, the Department is in the position of an appellant. It
7 has the burden to prove a substantial development permit should not
8 issue. We conclude that such a permit as modified by the County's
9 conditions and by Dr. Sacks' latest design, should issue.

10 The only germane issues raised were those of possible adverse
11 impacts on aesthetics and to the eagles. We have found that these
12 impacts are not significant. (Findings of Fact V, above.)

13 Having so found, we now conclude that a substantial development
14 permit as conditioned by the County and as further modified by Dr.
15 Sacks should issue.

16 VI

17 Any Finding of Fact which is deemed a Conclusion of Law is hereby
18 adopted as such. From these Conclusions of Law the Board enters the
19 following:
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ORDER

Neither a shoreline variance or conditional use permit is required.

The Board AFFIRMS the granting of a shoreline development permit to Dr. Sacks for the studio/library and REMANDS the matter to the County for action in conformance with this opinion.

DONE this 9th day of November, 1990.

SHORELINES HEARINGS BOARD


HAROLD S. ZIMMERMAN, Presiding

[SEE DISSENT]

JUDITH A. BENDOR, Chair


NANCY BURNETT, Member


MICHAEL GIBSON, Member


GORDON F. CRANDALL, Member

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2 DISSENTING OPINION

3 I respectfully dissent, concluding that a shoreline substantial
4 permit should not issue due to the impact on bald eagles, a threatened
5 species. The proposal is to build a studio/library right in the
6 middle of an important eagle perching area.

7 First, some background. In 1858 a survey party from the H.M.S.
8 Plumper surveyed the area, naming Eagle Point and Eagle Cove on the
9 south coast of San Juan Island. To this day, the names Eagle Point
10 and Eagle Cove remain on charts and maps, just as they first did on
11 British admiralty charts in 1858.

12 Dr. Sacks' 8.3 acres includes Eagle Point. The County has
13 designated the shoreline area as Conservancy. On his property, on the
14 uplands some 367 feet from the water, a 4,000 square foot house with a
15 panoramic view has been built. A separate 860 square studio is
16 proposed to be built 67 feet from the water within the shoreline
17 jurisdiction. The studio would adversely impact bald eagles.

18 Protecting a species requires one to also safeguard their
19 habitat. For eagles, the three main types of habitat are: nesting,
20 roosting, and food foraging areas. Eagles hunt by perching on high
21 points, from which they look for prey and defend their territory.
22 Often eagles perch in trees. However, in this treeless coastal south
23 side of San Juan Island, the eagles use high rocks as their foraging
24 posts.

1 Eagle Point is a key location for the eagles, jutting out into the
2 waters of Puget Sound, providing high, 220 degree unobstructed views
3 for miles around. The proposed studio is to be located near two
4 preching rocks. The studio would be, from the eagles' perception, the
5 same height as these rocks in one case almost 6 feet higher and with
6 the nearer rock, 2.5 feet lower. The studio's height alone would
7 negate these rocks' function as perching posts. Moreover there would
8 be human activity associated with the studio's use.

9 The studio would significantly adversely impact the eagles' use of
10 the rocks, thereby diminishing important habitat. The combination of
11 the building's existence, height, nearness, with the associated human
12 activities, would significantly adversely compromise the habitat.

13 This negative impact makes the studio proposal at this specific
14 location on the property inconsistent with the Shoreline Managment
15 Act.

16 *It is the policy of the state to provide for the*
17 *management of the shorelines of the state by planning*
18 *for and fostering all reasonable and appropriate*
19 *uses.[...] This policy contemplates protecting*
against adverse effects to the public health, the land
and its vegetation and wildlife, [...]. RCW
90.58.020; emphasis added.

20 The proposal also violates the San Juan County Shoreline Master
21 Program, including the following Conservation policies:
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1 1. County government should endeavor to assure the
2 preservation, reclamation, rehabilitation, and where
3 possible, the enhancement of unusual, fragile and/or scenic
4 elements, and of non-renewable natural resources.

5 2. Critical marine and terrestrial wildlife habitats
6 should be preserved. These areas should include, but
7 should not be limited to, breeding grounds, resting and
8 feeding areas for migratory birds, nursery areas, and
9 habitats of endangered species.[...] SMP 16.40.307

10 The SMP clearly requires that residential uses be in conformance
11 with Conservation policies:

12 Residential development shall be permitted in the
13 Conservancy Environment subject to the policies and
14 regulations contained in this Master Program. No
15 residential land division or other form of residential
16 development shall be approved unless Conservancy values
17 are fully recognized and protected.[...] Section
18 16.40.517; emphasis added.

19 Placing a separate studio right next to key eagle habitat violates
20 both the San Juan Shoreline Master Program and the Shoreline Management
21 Act. There remains ample opportunity to enjoy and use the 8.3 acres of
22 property without harming the environment. The shoreline substantial
23 development permit should be denied.

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JUDITH A. BENDOR, Chair